UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ANWAR, *et al.*, Plaintiffs v. FAIRFIELD GREENWICH LIMITED, *et al.*, Defendants.	Master File No. 09-cv-118 (VM)
This Document Relates To: *Zohar v. Fairfield Greenwich Group*, No. 09-cv-4031 (VM) ("*Zohar*")	

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO EXTEND TIME FOR SERVICE OF COMPLAINT

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Pursuant to FED. R. CIV. P. 4(m), Plaintiffs Nadav Zohar and Ronit Zohar ("Plaintiffs") hereby request that this Court enter an Order extending the time for service of the summons and complaint on defendants PricewaterhouseCoopers Bermuda ("PwC Bermuda"), PricewaterhouseCoopers Accountants, N.V. ("PwC (Rotterdam)" and PricewaterhouseCoopers LLP Chartered Accountants ("PwC Toronto"), Fairfield Greenwich (Bermuda) Ltd. and Andres Piedrahita ("Piedrahita"), until ninety (90) days after the service of any amended complaint in either *Anwar* or *Zohar*.

STATEMENT OF FACTS

On April 23, 2009, Plaintiffs filed a class action lawsuit on behalf all persons and entities who invested in Defendant Fairfield Sentry Limited ("Fairfield Sentry" or the "Fund") and held those investments as of December 11, 2008 and were damaged thereby…." *Zohar* Complaint [Compl.] ¶1. Plaintiffs assert common law causes of action, including breach of fiduciary duty, gross negligence, negligence misrepresentation, breach of contract and unjust enrichment, against defendants Fairfield Greenwich Group, Fairfield Greenwich Limited, Fairfield Greenwich (Bermuda) Ltd., Fairfield Greenwich Advisors LLC, and Fairfield Sentry (collectively, the "Fairfield Defendants"), Walter M. Noel, Jr., Jeffrey H. Tucker, and Andres Piedrahita (collectively, the "Individual Defendants"), Citco Bank Nederland N.V., Dublin Branch, Citco Global Custody N.V., and Citco Fund Services (Europe) B.V. (collectively, the "Citco Defendants"), and PricewaterhouseCoopers International Limited ("PwCIL"), PricewaterhouseCoopers LLP (US) ("PwC (US)"), PwC Bermuda, PwC Rotterdam and PwC Toronto (collectively, the "PwC Defendants"). *Id.* ¶¶20, 24, 32, 35, 42, 47, 53, 57, 63, 67, 69, and 78-81.

Plaintiffs allege that Defendants breached contractual and fiduciary obligations, and duties of care owed to Plaintiffs and the Class by, among other things, ignoring red-flags pointing to the illegal nature of the activities of Bernard L. Madoff and Bernard L. Madoff Investment Securities. *Zohar* separately alleges that the PwC Defendants provided services to Fairfield Sentry for the benefit of its investors, and that the PwC Defendants' negligent failures directly harmed them. *Id.* Other claims include unjust enrichment of the Fund, the other Fairfield Defendants, and the Individual Defendants by charging Plaintiffs and the Class hundreds of millions of dollars as fees predicated on the illusory profits the Fund reported, which reflected the success only of the Ponzi Scheme. *Id.*

On May 5, 2009, this Court consolidated *Zohar* with *Anwar v. Fairfield Greenwich Limited*, No. 09-cv-118 ("*Anwar*"). *See Zohar* Docket Entry No. 5.

On June 4, 2009, the Court entered an amended order consolidating *Zohar* with *Anwar* "for all pre-trial purposes," and directed "the parties in the consolidated cases ... to coordinate all pretrial proceedings...." *See Zohar* Docket Entry No. 6.

While the coordination of the *Anwar* and *Zohar* cases has proceeded, Plaintiffs have attempted to comply with his obligations under FED. R. CIV. P. 4 to serve all of the *Zohar* defendants.[1] Specifically:

- *Zohar* plaintiffs sent by Federal Express, the Notice of the Lawsuit, Waiver of Service of Summons, the *Zohar* complaint, a copy of this Court's Individual Practices and a copy of the SDNY ECF Rules and Information. *See Declaration of Hillary Sobel,* dated August 19, 2009 (the "*Sobel Decl*"), at ¶15 and Exhibit F. Thereafter, in a conversation with counsel to PwCIL, *Zohar* plaintiffs sought information about the representation of the non-U.S. resident PwC Defendants (*i.e.*, PwC Bermuda, PwC Rotterdam and PwC Toronto), from counsel to PwCIL, to no avail. *Id.* at ¶16. Defendants PwC Bermuda, PwC Rotterdam and PwC Toronto have not yet returned the Waivers of Summons.

[1] Defendants Fairfield Sentry Limited, Individual Defendants Walter Noel and Jeffrey Tucker, PwC Defendants PwC LLP (US) and PwCIL, and the Citco Defendants have all either accepted personal service or waived service of summons. *See Zohar* Docket Entry Nos. 3, 4, and 8-14.

- *Zohar* plaintiffs spoke with counsel for Fairfield Greenwich (Bermuda) Ltd. (who also serves as counsel to other Fairfield Defendants) seeking the acceptance of service of the complaint and to waive service of summons. Fairfield Greenwich (Bermuda) Ltd., while acknowledging receipt of the complaint, has refused to execute and return the Waiver of Service of Summons. *See Sobel Decl.* ¶¶3, 8, 9, 11, 13 and 14; *see also id.*, Exhibits A, B, D, and E.

- *Zohar* plaintiffs spoke with counsel for Andres Piedrahita, one of the Individual Defendants. Counsel indicated that he would not accept service of the complaint, and advised that service should be done as the *Anwar* plaintiffs did. *Sobel Decl.* ¶6. *Zohar* plaintiffs both sought to have Piedrahita waive service of summons and attempted service as the *Anwar* plaintiffs did, by service of Piedrahita at the offices of FGG. *Id.* at ¶7. Piedrahita has not yet returned the Waiver of Service of Summons and FGG refused to accept service on behalf of Piedrahita *Id.* at ¶10.

ARGUMENT

The *Zohar* Complaint was filed on April 23, 2009. Under Rule 4(m), the deadline to serve defendants is August 21, 2009. The *Zohar* plaintiffs have attempted to serve certain PwC Defendants (specifically, PwC Bermuda, PwC Rotterdam and PwC Toronto), Individual Defendant Piedrahita and Fairfield Defendant Fairfield Greenwich (Bermuda) Ltd. by using the procedure outlined in FED. R. CIV. P. 4(d). *See Sobel Decl.* ¶¶9,12, and 15; *see also id.* Exhibits A, C, and F. Rule 4(d) permits a party to request a waiver of service of summons and avoid the expenses of effectuating service as provided elsewhere in Rule 4. Specifically, Rule 4(d) provides:

> An individual, corporation or association that is subject to service under Rule 4(e), (f) or (h) has a duty to avoid unnecessary expenses of serving the summons. The plaintiff may notify such a defendant that an action has been commenced and request that the defendant waive service of summons.

FED. R. CIV. P. 4(d)(1).

FED. R. CIV. P. 4(m) provides that the summons and complaint shall be served on a defendant within 120 days after the filing of the complaint. Specifically, Rule 4(m) provides, in relevant part:

> If a defendant is not served within 120 days after the complaint is filed, the court – on motion or on its own...order that service be made within a specified time. [I]f the plaintiff shows good cause for the failure, the court must extend the time for service for an appropriate period.

FED. R. CIV. P. 4(m). If, however, the deadline is not met, the Rule allows the Court to direct that service occur within a specified time. Indeed, the Court has discretion to grant an extension of time, particularly where plaintiffs have attempted in good faith to serve the defendants.[2] An extension may be justified, for example, if the defendant is evading service. *See* FED. R. CIV. P. 4(m) advisory committee's note, 1993 Amendment.

Plaintiffs respectfully request an extension of time in which to serve certain non-U.S. resident PwC defendants, defendant Fairfield Greenwich (Bermuda) Ltd. and defendant Piedrahita, until ninety (90) days after the service of any amended complaint in either *Anwar* or *Zohar*. Plaintiffs make this request in good faith and have good cause for the relief they seek. Plaintiffs have attempted to serve the defendants to no avail:

- Certain PwC Defendants have not yet responded to the waiver of service summons, issued more than thirty (30) days but less than sixty (60) days prior to this motion. Moreover, counsel for PwCIL has indicated a lack of authority to advise *Zohar*'s counsel if and who represents those certain PwC Defendants. *See Sobel Decl.* ¶16.

- Defendant Fairfield Greenwich (Bermuda) Ltd., through its counsel, has accepted service of the complaint, but refuses to waive service of the summons, again notwithstanding that it has appeared in related cases. *See Sobel Decl.* ¶¶11, 13, and 14; *see also id.* at Exhibits B, D, and F.[3]

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[2] Rule 4(m) does not apply to service in a foreign country so long as plaintiff has attempted service in the foreign country. *See USHA (India), Ltd v. Honeywell Int'l, Inc.*, 421 F.3d 129, 133-34 (2d Cir.2005) (2d Cir. 2005). However, Plaintiffs here, in an attempt to avoid unnecessary costs and expenses, sought to serve the foreign defendants via rule 4(d), particularly where they have appeared in related matters pending in this Court. Thus, unlike the plaintiff in *USHA* who never even attempted to serve the foreign defendants, *Zohar* Plaintiffs attempted service in the most cost-effective means pursuant to Rule 4(d).

[3] *Zohar* Plaintiffs have engaged process servers to re-serve Fairfield Greenwich Advisors, Fairfield Greenwich (Bermuda) Ltd., and Fairfield Greenwich Limited.

- Defendant Piedrahita, through his counsel, both refused to accept service and has yet to respond to the request to waive service of summons, even though he has appeared in other related cases.[4] *See Sobel Decl.* ¶¶4, 6, 10, and 12; *see also id.* Exhibit C.

Although the sixty (60) period during which PwC Bermuda, PwC Rotterdam and PwC Toronto have to return an executed Waiver of Service of Summons has not yet expired, it will do so *after* the 120-day service period required by Rule 4(m). Therefore, the *Zohar* plaintiffs seek an extension of time in which either to receive the executed Waivers of Service of Summons or to effect formal service under Rule 4(f).

Formal service is required upon Defendant Fairfield Greenwich (Bermuda) inasmuch as its counsel has refused to execute the Waiver of Service of Summons. Fairfield Greenwich Bermuda protests that the acknowledgement of receipt of a letter confirming that it has accepted service and "[t]hat is sufficient to put this issue to rest." *See Sobel Decl.* Exhibit E. Yet, such an acknowledgment may not constitute formal service without either a waiver of summons or waiver of any defense that service was not proper. The acceptance of the complaint does not constitute formal service, unless the defendant has waived service of the summons. As the Supreme Court has observed, "Unless a named defendant agrees to waive service, the summons continues to function as the *sine qua non* directing an individual or entity to participate in a civil action or forgo procedural or substantive rights." *Murphy Bros. Inc. v. Michetti Pipe Stringing Inc.*, 526 U.S. 344, 351(1999). Plaintiffs have amply demonstrated their good faith in attempting to serve this defendant using Rule 4(d), particularly where Fairfield Greenwich Bermuda has appeared in the related actions and has retained counsel. Thus, this Court should extend the deadline by which to serve Fairfield Greenwich (Bermuda) Ltd.

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[4] On May 19, 2009, counsel for Mr. Piedrahita filed a notice of appearance in *Anwar*. *See* Anwar Docket Entry No. 142.

Finally, Defendant Piedrahita, although represented in related matters, has so far not returned the waiver of service of the summons. Piedrahita's counsel received the written request to waive service of summons on June 25, 2009. *See Sobel Decl.* Exhibit C. The 60-day period in which Piedrahita has to return an executed waiver has not yet run; it is expected to do so after the expiration of Rule 4(m)'s 120-day service deadline. Moreover, *Zohar* plaintiffs endeavor to find Defendant Piedrahita and serve him personally. However, that service will not be concluded before the expiration of the 120-day period required by Rule 4(m). As no matters addressing the merits of the *Zohar* claims against defendant Piedrahita have arisen yet, and Plaintiffs' good faith attempt to avoid unnecessary costs has been rebuffed, an extension of the time to serve Piedrahita is warranted.

Conclusion

For the reasons set forth above, Plaintiffs request that the Court extend the time for service of the summons and complaint on all defendants for a reasonable period, *i.e.*, until ninety (90) days after the service of any amended complaint in either *Anwar* or *Zohar*. In addition, and although Rule 4(d) provides only for recovery of costs with a U.S. resident defendant, this Court should impose the additional costs of service under the authority of 28 U.S.C. §1927 ("Any attorney ... who so multiplies the proceedings in any case unreasonably ... may be required by the court to satisfy personally the excess costs, expreses, and attorenys' fees reasonably incurred because of such conduct.").

Dated: August 20, 2009

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